IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3545 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAMALABHAI JAHALABHAI GANAVA SINCE DECEASED

Versus

STATE OF GUJARAT

Appearance:

MR JT TRIVEDI for Petitioners No. 1-1/3

Ms. Pandit, AGP for Respondents No. 1-2

Respondents No. 3 to 5 served.

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 23/10/2001

ORAL JUDGEMENT

Heard learned advocate Mr. Trivedi for the petitioners and Ms. Pandit, the learned AGP for the

respondent authorities. Respondents No. 3 to 5 have been served but no one has appeared on their behalf and nobody has remained present on their behalf when the matter was taken up for final hearing.

In this petition, rule was issued by this Court and ad interim relief in terms of para 7(B) of the petition was granted on 15.7.1986. No reply thereto has been filed either by the respondent State Authorities or by the respondent No. 3 to 5.

The present petition was filed by Ramalabhai Jahalabhai Ganava challenging the orders passed by the Assistant Collector, Dahod dated 15.9.1984 as confirmed by the revisional authority in revision application no. 11 of 1985 by order dated 10.6.1986. Said petitioner Ramalabhai J. Ganava died during the pendency of the present petition and thereafter, pursuant to the orders dated 19.4.2001 passed by this Court in Civil Application (Stamp) No. 9010 of 1988, his heirs and legal representatives have been brought on record.

Brief facts of the present petition are to the effect that the original petitioner had purchased land admeasuring H.0.49.57 Are bearing Survey No. 22/5 of Mouje Sahada of Dahod Taluka in the year 1958-59 and the said petitioner was in in occupation thereof since then and has been cultivating it by putting in hard work, manure, fertilizer, seeds etc. His name was shown as occupier in the village form no. 7/12. According to the petitioners, a notice was issued by the Assistant Collector, Dahod to the respondents no. 3 to 6 on 15.9.1984 under section 6(2) of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 ("the Fragmentation Act" for short) alleging breach of section 7 of the Fragmentation Act in connection with the land in question and a case under the said Act being Case No. Land/Fagmentation/Case No. 46 of 1984 was filed before the Assistant Collector, Dahod which came to be decided by the Assistant Collector, Dahod on 21.11.1984. Under the said order, the Assistant collector has held that the said transaction was illegal and was violative of section 9(1) of the Fragmentation Act and fine of Rs.250.00 was imposed and unauthorized occupation was directed to be removed. Said order dated 21.11.1984 passed by the Assistant Collector, Dahod was challenged by the petitioner before the revisional authority namely Deputy Secretary (Appeals) Revenue Department State of Gujarat by filing the revision application no. 11 of 1985 which came to be rejected by the revisional authority on 10.6.1986 while confirming the order passed

by the Assistant Collector, Dahod dated 21.11.1985. The original petitioner has, therefore, challenged the said two orders dated 21.11.1985 and 10.6.1986 before this Court by way of this petition.

During the course of hearing, learned advocate Mr. Trivedi appearing for the petitioners has submitted that both the authorities have not considered important aspect of the matter that the proceedings under section 9(1) of the fragmentation Act were initiated after a period of more than twenty five years and, therefore, there was delay in exercising the powers. According to him, the authorities below have not considered that there was unreasonable delay in exercise of the suo motu powers by the authority. He has submitted that the revisional authority has not considered the decision of this court which has been referred in the order and relied upon by the petitioner. He has also submitted that the transaction in respect of the land in question between the deceased petitioner and respondents nos. 3 to 5 was not based upon any registered document of sale but it was an oral transaction of alleged mortgage without registration thereof and there was no need to take prior permission of any authority. Therefore, he has submitted that there was no any breach of section 7 as well as section 9 of the Fragmentation Act as alleged. He has also submitted that the Assistant Collector, Dahod has not considered these facts while passing the order dated 21.11.1985. He has also submitted that since there was no any registration of the document for the transaction of the land in question, prior permission also was not required to be obtained. He has relied upon the decision of this court in case of Ranchhodbhai Lallubhai Patel versus State of Gujarat and others reported in 1984 (2) GLR 1225. He has also relied upon the another decision in case of Punabhai Dhedubhai Baraiya versus Patel Chhaganbhai Parshottamdas and another reported in 1983 (2) GLR page 1165 as well as the decision in case of Patel Chhotabhai Shankerbhai v. Patel Shantabhai Narsibhai reported in 1975 GLR 247. He has also relied upon the decision of this court in case of Mohamad Kavi Mohamad Kavi versus Fatmabai Ibrahim reported in (1997) 6 Supreme Court Cases 71. He has also relied upon the decision of the Full Bench of this Court in case of Jadav Prabhatbhai Jethabhai v. Parmar Karsanbhai Dhulabhai reported in 2001(1) GLR 16.

Relying upon the aforesaid decisions, he has submitted that since the transaction of the lands in question was an oral transaction and since it was not registered transaction, therefore, there was no breach of

section 9(2) of the Fragmentation Act. According to him, however, this aspect of the matter was not considered by the authorities below while considering the matter. He has submitted that the aspect of delay also has not been taken into consideration by the authorities and, therefore, orders passed by the authorities below are illegal and required to be quashed and set aside.

Learned Asstt. G.P. Ms. Pandit appearing for respondent No. 1 and 2 has submitted that the Assistant Collector, Dahod was right in initiating action under section 9(1), (2) and (3) of the Fragmentation Act for the breach of section 7 thereof since no prior permission was obtained by the petitioner before completing the said transaction and, therefore, according to her submission, such transaction between the parties was nullity and the authority was justified in exercising the suo motu powers under the provisions of the Fragmentation Act and since the transaction was nullity, then, the authority can initiate such proceedings at any time and at any stage by exercising suo motu powers. In support of her contentions, she has relied upon the following decisions;

(1) Saburbhai Hemabhai Chauhan versus State of Gujarat and Others reported in 2000(1) GLH 580.
(2) State of Orissa and others versus Brundaban Sharma and another reported in 1995 Supp (3) Supreme Court Cases 249.

Relying upon the aforesaid decisions, she has submitted that when no period of limitation is prescribed under the Act itself, revisional powers should be exercised by the revisional authority within reasonable period and when the transaction is non-est or nullity, then, the authority is justified in initiating such proceedings even after the period of twenty five years and thus, since the transaction of the land in question was nullity and void ab-initio, the question of delay in initiation would not come in the way of the authorities for initiating the proceedings. She has submitted that the void transaction cannot confer any right upon the petitioners and, therefore, validity of such orders can be examined and considered by the authorities at any stage and at any time while exercising the suo motu powers. She has submitted that the question of 27 years' delay was examined by the apex court in the aforesaid decision.

I have considered the submissions made by the learned advocates for the respective parties. As per the averments made in the memo of petition, the original

petitioner had purchased land admeasuring H.0.49.57 Are bearing Survey No. 22/5 of Mouje Sahada of Dahod Taluka in the year 1958-59 and the said petitioner was in occupation thereof since then and has been cultivating it by putting in hard work, manure, fertilizer, seeds etc. His name was shown as occupier in the village form no. 7/12. According to the petitioners, a notice was issued by the Assistant Collector, Dahod to the respondents no. 3 to 6 on 15.9.1984 under section 6(2) of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 ("the Fragmentation Act" for short) alleging breach of section 7 of the Fragmentation Act in connection with the land in question and a case under the said Act being Case No. Land/Fagmentation/Case No. 46 of 1984 was filed before the Assistant Collector, Dahod which came to be decided by the Assistant Collector, Dahod on 21.11.1984. Under the said order, the Assistant Collector has held that the said transaction was illegal and was violative of section 9(1) of the Fragmentation Act and fine of Rs.250.00 was imposed and unauthorized occupation was directed to be removed. Said order dated 21.11.1984 passed by the Assistant Collector, Dahod was challenged by the petitioner before the revisional authority namely Deputy Secretary (Appeals) Revenue Department State of Gujarat by filing the revision application no. 11 of 1985 which came to be rejected by the revisional authority on 10.6.1986 while confirming the order passed by the Assistant Collector, Dahod dated 21.11.1985 and, therefore, the original petitioner has challenged the said two orders by way of this petition. Before the Assistant Collector, it was submitted by the original petitioner that the land in question was in his possession since 1965 and are cultivating the same and,therefore, it was prayed that the land in question must be taken in the name of the petitioner. It was submitted by the respondent no.3 to 5 before the Assistant Collector that though the petitioner is in possession of the land in question, since the transaction in respect of the land in question is illegal, therefore, possession of the petitioner cannot be considered to be legal and, the respondents are prepared to pay the fine for the breach of section 7 of the Fragmentation Act.

Considering the record, the Assistant Collector, Dahod has come to the conclusion that the notice under section 6 of the Fragmentation Act was served upon the respondents no.3 to 5 and the Assistant Collector has come to the conclusion that the transaction has been arrived at between the respondents NO.3 to 5 and the petitioner without obtaining prior permission of the authority and, therefore, there was breach of section 7

of the Act and, therefore, he held that such transaction is contrary to the provisions of the Act and fine of Rs.250.00 was imposed and also directed to remove the unauthorized occupation from the land in question under section 9(3) of the Act. He has also directed the Mamlatdar to remove the unauthorized occupation while exercising the powers under section 79 of the Bombay Land Revenue Code. In the proceedings before the revisional authority against the said order passed by the Assistant Collector, Dahod, it was pointed out that though the land has been registered as fragment, inspite of that fact, without obtaining prior permission from the authority, the land has been given to the petitioner by way of alleged mortgage and, therefore, there was breach of section 7 of the Fragmentation Act. Before the revisional authority, on behalf of the petitioners, reliance has been placed upon the decision of this Court rendered in special civil application no. 1583 of 1977 dated 21.6.1984 wherein it was pointed out that the powers were exercised after a period of seven years and the exercise of the powers after seven years has been considered to be unreasonable and therefore, the action has been declared to be illegal. It has also been submitted before the revisional authority that in the instant case, the transaction has taken place in the year 1958-59 and the proceedings were initiated in the year 1984 by issuing notice and, therefore, the action was not initiated within reasonable period and, therefore, in view of such unreasonable delay in initiation of the proceedings, the order of the Assistant Collector is required to be set aside. Before the revisional authority, objections were raised on behalf of the respondents no.3 to 5 that once the appeal has been filed by the petitioner under section 34, then, the revision would not lie; reliance has also been placed upon the decision of the Madras High Court as well as the apex court and it has been submitted that the authority was right in exercising the powers since the transaction was illegal and contrary to the provisions of the Fragmentation Act and, therefore, in such circumstances, question of limitation would not come in the way. The revisional authority has, after considering the papers and the contentions raised in the revision application as well as the arguments advanced for and on behalf of the respective parties, observed that the land in question has been entered as a fragment vide entry no. 287; since the original occupants of the land in question have been served with a notice under section 6(2) of the Act, present applicant is not required to be served with such a notice under section 6(2) of the Act. The revisional authority has observed that the land in question has not

been purchased by the applicant petitioner but it was found to have been obtained by way of an agreement of alleged mortgage; there is no entry of mortgage on the village record. The revisional authority has also considered that that neither the applicant nor the respondents have initiated proceedings for exemption as per the provisions of the circular of the Government dated 21.6.1979 even if the land in question is an irrigated land. As regards the decision of the High Court cited on behalf of the petitioner before the revisional authority, the revisional authority was of the view that if it is proved that any proceedings were contrary to law, then, the same can be taken into revision at any time and, therefore, there would be no bar of limitation for taking such proceedings into revision. On such consideration, the revisional authority has not accepted the submissions made by the petitioner as regards delay in initiation of the proceedings and has rejected the revision application preferred by the petitioner while confirming the order dated 21.11.1984 passed by the Assistant Collector, Dahod, vide order dated 10th June, 1986.

In the facts of the present case, one aspect is quite clear and undisputed between the parties. From the record, it is clear that there was no any registered document for the transaction of alleged mortgage between the respondent No. 3 to 5 and the petitioner. The another aspect is that the lands in question were alleged to have been mortgaged in the year 1958-59 whereas it is the case of the petitioner that the lands in question were purchased by oral transaction of sale in the year 1958-59 and the names were recorded in the village form from the year 1965-66 to 1984-85 and that record has been produced by the petitioner. Thus, in respect of the transaction which has taken place in the year 1958-59, the proceedings were initiated by the concerned authority by issuing show cause notice dated 15.9.1984 to respondent no.3 to 5. Thus, it is clear that the suo motu powers were exercised by the concerned authority after more than twenty five years' period under the Fragmentation Act.

Therefore, in view of these undisputed facts, the transaction is not based upon any written or registered document between the parties and the powers were exercised after a period of more than 25 years. IN view of these facts, the view taken by this Court in the case of Patel Chhotabhai SHankerbhai v. Patel Shantabhai Narsibhai reported in 1975 GLR 247 is relevant. In paragraph 9 and 10 of the decision, it has been held by this Court as under:

"9. The trial court decreed the suit holding that Phoolchand committed breach of contract in that, he had failed to pay the balance due by him on or before the due date. In appeal, the High Court of Madhya Pradesh reversed the decree. In the appeal preferred by Nathulal, the Supreme Court observed;

'Under the terms of the agreement, Nathulal had undertaken to get the name of his brother Chittarmal removed from the revenue records and to get his own name entered, but the lands continued to stand recorded in the name of Chittarmal till October 6, 1952 and before that date Nathulal rescinded the contract. Again by virtue of sec. 70(4) of the Madhya Bharat Land Revenue and Tenancy Act 66 of 1950, Phoolchand not being an agriculturist the land could not be sold to him without the sanction of the State Government.

In the absence of any specific clause dealing with this matter, a condition that Nathual will secure the sanction under section 70(4) after paying the appropriate fee must be implied for it is well settled that where by statute property is not transferable without the permission of the authority, an agreement to transfer the property must be deemed subject to implied condition that the transferor will obtain the sanction of the authority concerned. '

The argument raised by the counsel for Nathulal that, by virtue of sec. 70(8) of the Madhya Bharat land Revenue and Tenancy Act, the plea of part performance is not available to a person put in possession of the property under a contract of sale was found to be without force. The relevant observations on the point are;

'sec. 70(8) provides;

no sale under this section shall be deemed to be valid until the sale deed effecting such a sale has been registered in accordance with the law of

registration in force for the time being.

But this clause only requires that not only the conditions prescribed by sec. 70, but registration of sale deed in accordance with the law of registration for the time being in force is a condition required to be complied with before a sale is deemed valid. There is no sale in the present case and Phoolchand is not relying upon any sale. He is relying upon a contract of sale and equity which he may set up to defend his possession against the claim made by Nathubhai. To the making of such a claim, relying upon the doctrine of part performance in section 53A of the Transfer of Property Act, there is nothing in section 70(8) of the Madhya Bharat Land Revenue and Tenancy Act 66 of 1950 which may operate as a bar.'

10. According to the provisions of sec. 70(4) of the Madhya Bharat Land Revenue and Tenancy Act 66 of 1950, the land could not be sold to a person who is not an agriculturist without the sanction of the State Government. The above provisions seem to a certain extent similar to those of section 43(1) of the Tenancy Act so far as the question of sanction for sale is concerned. It was open to deceased SHantabhai to obtain permission of the Collector even after he had executed the agreement of sale in favour of Chhotabhai. There is thus nothing in section 43(1) of the Tenancy Act to show that agreement of sale cannot be entered into before obtaining a sanction of the Collector. This shows that, the agreement of sale in question is legal and valid. It is, therefore, open to Chhotabhai to raise the defence of part performance under section 53A of the Transfer of Property Act. "

In case of Punabhai Dhedubhai Baraiya versus Patel Chhaganbhai Parshottamdas and Another reported in 1983 (2) GLR page 1165, this Court has observed as under in para 6 of the decision :

"6. I shall deal with the submissions raised by Mr. Mehta in support of the petition in the same sequence in which they were raised before me. SO far as the first contention of Mr. Mehta

is concerned, it must be appreciated that by the agreement dated 14.3.1970, the petitioner, who was a deemed purchaser handed over possession of the land to respondent No.1 who had advanced him loan for making payment of instalment and had agreed to get a pucca mortgage deed executed after obtaining permission of the Collector. The aforesaid agreement is an unregistered agreement. The petitioner's contention is that in substance, the agreement operates as a usufructuary mortgage as the petitioner had parted with possession of the land in favour of respondent no.1 with a view to securing his dues and to get himself paid off from the usufruct of the land. It is not possible to agree with the aforesaid contention of Mr. Mehta for the simple reason that before the transaction can operate as a usufructuary mortgage, it has to comply with the legal requirement of sec. 59 of the Transfer of Property Act. Under the said provision, it has been clearly laid down that where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title deeds, can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. In the present case, it is an admitted position between the parties that the petitioner had borrowed Rs.15,000.00 in cash from respondent No. 1 in order to pay up the instalment of purchase price. Thus, the principal money secured were more than Rs.100.00 If for that purpose, the land was handed over in possession of respondent No.1, the transaction cannot be treated a usufructuary mortgage unless the document was registered as per the requirement of section 59. The agreement in question is admittedly an unregistered document. Thus, it cannot operate as completed mortgage transaction. Sec. 43 of the Tenancy Act as applicable at the relevant time in 1970 when the impugned transaction took place provided as under:

'(1) No land or any interest therein purchased by a tenant under sec. 17B 32, 32F, 32I, 32U or 43D or sold to any person under sec. 32P or 64 shall be transferred by sale, gift, exchange, mortgage, lease or assignment without the previous sanction of the Collector and except in consideration of payment of

such amount as the State Government may by general or special order determine; and no such land or any interest therein shall be partitioned without the previous sanction of the Collector.'

A mere look at the said provisions shows that transactions which are hit by sec. 43(1) if they are not entered into after obtaining previous sanction of the Collector, are all completed transactions like sale, gift, exchange, mortgage etc.which by themselves will operate as fully completed and legally operative transfers. in the present case, the alleged transaction is a transaction under which the petitioner is said to have created a usufructuary mortgage on the land in question in favour of respondent no. 1. As I have already shown above the agreement dated 14.3.1970 by itself cannot operate as a completed usufructuary mortgage transaction as it is unregistered. If that is so, it cannot be said that the petitioner had mortgaged the land in favour of respondent No.1 on 14.3.1970 as envisaged by section 43 (1). Consequently, the said transaction cannot be said to have been hit by section 43 as previous sanction of the Collector was not obtained before the petitioner entered into the agreement in question in favour of respondent No. 1. If any authorities were needed to highlight the interpretation of various clauses of sec.43(1), they are supplied by two decisions of this court in kuberdas Inamdar versus Lilaram 13 GLR 343 and Patel Chhotabhai versus Patel Shanabhai 16 GLR 247. Consequently, it must be held that the GRT was right when it took the view that sec. 84-C proceedings could not have been initiated against the petitioner on the ground that the agreement dated 14.3.1970 entered into by him in favour of respondent No.1 was a completed mortgage transaction which was violative of the provisions of sec.43(1) of the Act and consequently, the said transaction was liable to be declared as invalid. The first contention of Mr. Mehta for the petitioner, therefore, fails and stands rejected."

Considering the above two decisions of this Court and also considering the facts of the present case, in the instant case, the transaction of alleged mortgage has not been registered and, therefore, question of having prior permission of the authority concerned under the

provisions of the Fragmentation Act does not arise.

In respect of the another contention about exercise of the powers by the authority after unreasonable period, the view of this court in case of Ranchhodbhai Laljibhai Patel versus State of Gujarat reported in 1984 (2) GLR 1225 is relevant. In para 4 of the said decision, this court has observed as under:

"4. Now, it is obvious that the authorities under the Act have been enjoined to pass proper orders under sec. 9 for declaring the transaction contrary to the said act to be null and void and also to pass consequential orders of fine as well as summary eviction. But the said statutory powers like any other statutory powers have to be exercised within reasonable time. If that concept is kept out, any statutory powers would be exercised after a number of years or decades. In the meantime, the affected parties would have materially altered their position and irreparable injury would be caused to them and it would be impossible to put the clock back. If such powers can be exercised after unduly long delay. On the peculiar facts of this case, it has got to be held that the power exercised by the concerned authorities under sec. 9 was at grossly belated stage and as there was unreasonable delay in exercise of that power, the the exercise would be ex facie unreasonable, unjust and illegal. It may be recalled that the petitioner purchased a part of the block on 2.1.1967 by a registered sale deed. It is true that ignorance of law is no excuse and merely because the petitioner pleaded that he was ignorant of the legal requirement of obtaining prior permission of the collector, the same cannot stand in good stead to him. Consequently, if the authorities would have been vigilant enough for enforcement of the provisions of the Act and had initiated proceedings under sec. 9 at the earliest, the petitioner would have no defence in such proceedings. But on the facts of the case, the situation is entirely different. The authorities acting under the act did not initiate any proceedings against the petitioner and opponent No.3 for 7 long no of years. In the meantime, the petitioner who had purchased the land for the purpose of putting up a residential house, spent a large amount of Rs.25,000.00 and

constructed a residential house with facilities of latrine, bathroom and a store room. It is obvious that when no proceedings were initiated against them for a long time, there could arise a reasonable belief for the petitioner that there was nothing wrong with the sale deed under which he had purchased the land and he had become full owner of the land. He could never have dreamt that after 7 years, he would be presented with a show cause notice under sec. 9. During that time, the petitioner had irretrievably changed his position to his detriment. such an inaction on the part of the authorities exercising powers under the Act for a number of years and waking up ne fine morning after 7 years by issuing notice to the concerned parties for showing cause why the transaction entered into by them should not be declared as null and void, has got to be held, on the facts of this case, to be quite unreasonable. It is also to be appreciated that the Deputy Collector passed the order of summary eviction against the petitioner in 1974 almost 10 years after the date of the original transaction of 1967. Hence, the exercise of such power would be unjust on the facts of this case. If any authority were needed in support of my conclusion to which I have reached on the facts of the case, it is supplied by the decision of the Supreme Court in Mansaram v. S.P. Pathak and Others (Civil appeal No. 1262 (N) of 1978, decided by D.A. Desai and R.B. Misra, JJ. on 29.9.19830. D.A. Desai, J. speaking for the Supreme Court has made the following pertinent observations;

'Where the power is conferred to effectuate a purpose, it has to be exercised in a reasonable manner and the reasonable exercise of power inheres its exercise within a reasonable time. This is too well established to need buttressing by a precedent. However, one is really available in State of Gujarat v. Patel ravhag Natha and Others (1970) 1 SCR 335.'

It is true that no period of limitation is laid down by the said Act indicating as to within what period, the concerned authorities can initiate proceedings under sec.9. It is also true that power given to the authorities is coupled with

> duty to act as per the provisions of sec.9 if power under sec.9 can be validly invoked. But that does not mean that power can be exercised at any time may be after years or decades. Exercise of power has to be justified on the facts of each case and if on the facts of a given case, it is found that exercise of power after lapse of sufficiently long period between the impugned transaction and the date of exercise of that power would be arbitrary and unreasonable due to the fact that in the meanwhile parties had changed their position irretrievably obvious of any possibility of future action by the authorities functioning under the act on account of prolonged inaction on the part of these authorities and any attempt to put back the clock would result in irreparable injury to the concerned parties, then such exercise has to be treated to be unjust and illegal. In that view of the matter, as seen above, on the facts of this case, the exercise of the power under sec.9 against the petitioner would be unreasonable and arbitrary. Only on this short ground and without going into other contentions which are sought to be canvassed by Mr. Sanjanwala in support of the petition, this petition will have to be allowed."

Said question has been examined by this Court on various occasions. In case of Devshibhai Bhimabhai Rabari versus State of Gujarat and others reported in 2001 (2) GLR 1097, this Court has observed that while exercising the powers under section 211 of the Code by the Collector, much delay has been caused in taking the order into revision and, therefore, the order in question has been set aside by this court. Similarly, in case of Ravasinh Ranubha versus V.S. Sinha or his successors and others reported in 2001 GLR 1679, this Court has observed that the limitation of exercise of revisional powers in such a matters is one year which can be considered to be reasonable period for exercise of the revisional powers. Then, in case of Shri Ravindra Darshan Co-op. Housing Society Ltd. versus Prafulkumar Thakar, Secretary, Revenue Department and another reported in 2000(2) GLR 1639, this Court has observed that the powers under section 211 of the Bombay Land Revenue Code was exercised after unreasonable period. It was held that though no period of limitation has been prescribed under section 211 of the COde, this power must be exercised in reasonable time and the length of reasonable time must be determined by the facts of the case and the nature of the order which is being revised, the State cannot keep sword

hanging in respect of the property by chosing to act and revise the order at its sweet will which may be after seven years as it was sought to be done in the instant case after more than twenty five years. Similarly, this court has considered the same question in case of Lavjibhai Motiram Prajapati versus State of Gujarat reported in 2000(3) GLH 551 and has observed that when no period of limitation has been prescribed under the Statute, then, the powers must be exercised within reasonable time. The Division Bench of this Court has also considered the question in case of State of Gujarat versus Pravinbhai Bhailalbhai Gor reported in 2000(3) GLR page 2168. In para 5 of the judgment, this Court has observed as under :

"5. We have heard the learned Advocates appearing for the parties. We have examined the facts and circumstances emerging form the record of the present case. One thing is quite certain and obvious that though the Collector is competent to exercise revisional powers invoking the aids of the provisions of Rule 108(6) of the Gujarat Land Revenue Rules, if he finds that the authority below has committed some illegality or any order recorded by the authority below is unjust or perverse. However, it is settled proposition of law that although no period of limitation for exercise of such revisional is prescribed, it has to be exercised within a reasonable period of time for the simple reason that by passage of time or on advancement of the age of the dispute, the rights of the parties get crystallized and transfers also take place in between the period. The expression 'reasonable period" as such is not statutorily defined. However, reasonable period in a given case would, obviously, depend upon the facts and circumstances of the case and the Court is obliged to consider the relevant facts and circumstances and for determining the expression 'reasonable period' in each case. In the present case, the delay has occurred for more than eight years. Nothing has been successfully shown on behalf of the appellant original respondent. state of Gujarat, as to why the exercise of power under Rule 108(6) of the Rules isnot taken in reasonable time or in other words, the reasons for inordinate delay for employing into the service the statutory powers of revision under

Rule 108(60 of the Rules. in absence of such reasons, one thing is very clear that the period of delay of about 9 years by no stretch of imagination could be said to be reasonable period. This aspect itself goes to the root of the matter. Since we have found that the Collector has failed to exercise the discretionary power of revision against the impugned order of the revenue authority within a reasonable period, the impugned order of directing of the cancellation of the mutation entry in the name of the original petitioner could not be sustained. since this ground itself is sufficient to throw the appeal ovoer board, it would not be necessary for us to divulge meticulously, at this stage, in this appeal, other aspects which the learned single Judge has gone into while determining the merits of the petition before him. "

Similarly, in case of Parshottambhai Ramjibhai Rathod versus Dhirajlal Dharamshi Mistry reported in 1999(2)GLH 310, this Court has also observed that the powers of revision exercised by the suo motu revision under section 211 of the Bombay Land Revenue Code does not prescribe limitation does not mean that such power can be exercised at any time but the same has to be exercised within reasonable time. In context of the suo motu powesr under section 84C of the Tenancy Act, this Court has also considered in case of State of Gujarat versus Shamraji Chelaji and others reported in 1999 (2) GLH page 917 and has observed that the exercise of the powers under section 84C of the Tenancy Act after a period of four to 11 years has been considered to be unreasonable period as the authority has not been able to justify the delay in taking the action after lapse of four to eleven years.

The question has been considered by the apex court in case of Mohamad Kavi Mohamad Amin versus Fatmabai Ibrahim reported in (1997) 6 SCC 71. In para 2 of the decision, the apex court has held as under:

"2. Although Mr. Bhasme learned counsel appearing for the appellant took a stand that under section 63 of the Act aforesaid, there should not be any discrimination amongst the agriculturists with reference to the State to which such agriculturist belongs. But according to him, even without going into that question, the impugned order can be set aside on the ground

that suo motu power has not been exercised within a reasonable time. section 84-C of the Act does not prescribe any time for initiation of the proceedings. But in view of the settled position by several judgments of this court that wherever a power is vested in a statutory authority without prescribing any time limit, such power should be exercised within a reasonable time. IN the present case the transfer took place as early as in the year 1972 and suo motu inquiry was started by the Mamlatdar in September, 1973. Iuf sale deeds are declared to be invalid the appellant is likely to suffer irreparable injury because he has made investments after the aforesaid purchase. In this connection, on behalf of the appellant reliance was placed on a judgment of Justice SB. Majmudar (as he then was in the High Court of Gujarat) in State of Gujarat v. Jethmal Bhagwandas Shah disposed on 1.3.1990, where in connection with section 84C itself, it was said that the power under the aforesaid section should be exercised within a reasonable time. This Court in connection with other statutory provisions, in the case of State of Gujarat v. Patil Raghav Natha and in the case of Ram Chand v. Union of India has impressed that where no time limit is prescribed for exercise of a power under a statute, it does not mean that it can be exercised at any time; such power has to be exercised within a reasonable time. We are satisfied that in the facts and circumstances of the present case, the suo motu power under section 84C of the Act was not exercised by the Mamlatdar within a reasonable time. Accordingly, the appeal is allowed. The impugned orders are set aside. No costs."

I have also considered the decisions cited by Ms. Pandit, the learned AGP for the respondent authorities. in case of State of Orissa and others versus Brundaban Sharma and another reported in 1995 Supp 93) Supreme Court Cases 249 wherein, in para 16, the apex court has observed as under:

"16. It is, therefore, settled law that when the revisional power was conferred to effectuate a purpose, it is to be exercised in a reasonable manner which inheres the concept of its exercise within a reasonable time. Absence of limitation is an assurance to exercise the power with caution or circumspection to effectuate the

purpose of the Act, or to prevent miscarriage of justice or violation of the provisions of the Act or misuse or abuse of the power by the lower authorities or fraud or suppression. Length of time depends on the factual scenario in a given case. Take a case that patta was obtained fraudulently in collusion with the officers and it comes to the notice of the authorities after a long lapse of time. Does it lie in the mouth of the party to the fraud to plead limitation to get away with the order ? Does the lapse of time an excuse to refrain from exercising the revisional power to unravel fraud and to set it right ? the answers would be no.'[emphasis supplied]

Ms. Pandit has also relied upon the decision in case of Saburbhai Hemabhai Chauhan v. St ate of Gujarat and Ors. reported in 2000(1) GLH 580. Para 12 and 13 of the said decisions are reproduced as under which are relevant in the facts of the present case.

"12. Thus, in the instant case, since the sale deed annexure A is void ab initio, the said sale deed cannot be legalized simply because delayed action was taken. On the facts of the present case, it cannot be said that the authorities were aware of illegal transaction; rather it was a case where sale transaction was concealed and fraud was played upon the authorities. it was only when the record of rights team had gone to the village for inspection that the owners made representation on 12.4.1990 before the Deputy Mamlatdar, Record of Rights and then the sale deed in favour of the petitioner came to light.

13. Breach of condition case no. 22 of 91 on such report was initiated in the year 1991. It is, therefore, difficult to accept the contention that it was a case of delayed action. The disputed land originally was entered in the name of Bai Mani widow of Bhima Rama. The consolidation operations came in the year 1957 and regarding new block no. 7, entry was made that it was a new tenure. Bai Mani expired in the year 1972-73. Thereafter, the names of her nephews Chhatrasinh Hamirsinh and Kohyabhai Hamirsinh were entered as coparceners. Once the entry was made in the life time of Bai Mani that the land was new tenure the entry in the names of the vendors of the petitioner could not be made

> as coparceners of deceased Bai Mani. This transaction was also rightly considered to be illegal by the authorities. Thereafter, when the sale deed was executed in the year 1974 by the vendors in favour of the petitioner again the petitioner's name was entered as coparcener. The purchaser in no case can be treated as co-parcener hence this entry was made deceitfully. If the sale deed would have been disclosed then the position would have been different. It is, therefore, a case where a fraud was definitely played upon the authorities and the authorities were not aware of the said sale transaction before the Record of Right team had gone to the village for making inspection. For the first time on 12.4.1990, representation was made by the previous owners regarding sale deed and then breach of conditions case no. 42 of 1991 came into existence. As such, if the entry was certified in the year 1980 or 198 under fraud or misrepresentation it cannot be said that it was delayed action which was taken in 1991. Thus, this ground also cannot be pressed into service for holding the three impugned orders to be illegal and invalid."

I have considered the aforesaid decisions. Now, in the instant case, it is clear that the authority has exercised the powers after a period of 25 years under the provisions of the Fragmentation Act in respect of the oral transaction of alleged mortgage which is not even registered and/or recorded. According to the petitioner, the transaction of alleged mortgage was in fact an oral transaction of sale wherein the possession of the land in question has already been handed over by the respondents no. 3 to 5 to the petitioner in the year 1958-59 whereas the proceedings were initiated on 15th September, 1984 by issuing the notice. It is, therefore, clear that the powers were exercised after a period of 25 years. As per the observations made by the apex court in case of State of Orissa and others versus Brundaban Sharma and another (supra), when the revisional power was conferred to effectuate a purpose, it is to be exercised in a reasonable manner which inheres the concept of its exercise within a reasonable time. The apex court has also observed that the absence of limitation is an assurance to exercise the power with caution or circumspection to effectuate the purpose of the Act or to prevent miscarriage of justice or violation of the provisions of the Act or misuse or abuse of the power by the lower authorities or fraud or suppression. In the

said decision, the apex court has clearly observed that the length of time depends on the factual scenario in a given case. Therefore, the ratio laid down by the apex court in the said decision in case of State of Orissa v. Brundaban (supra) has to be applied in light of the facts of the present case. In the said case, the apex court has clearly observed that the absence of limitation is an assurance to exercise the power with caution or circumspection to effectuate the purpose of the act or to prevent miscarriage of justice. However, in the instant case, it is not the case of the respondent authorities that there was fraud or collusion or misrepresentation before the officers by the concerned party. Therefore, the ratio laid down in the said case has to be appreciated in the facts of the present case. In the instant case, it is not the case of the respondent authorities that there was any misrepresentation or fraud and it is also equally clear that in respect of the transaction of the year 1958-59, the powers were exercised by the authority concerned in the year 1984 by issuing notice for the first time. Therefore, in light of the facts of the present case, said decision is not helpful to the respondents. Similarly, in case of Saburbhai Hemabhai Chauhan v. State of Gujarat & Ors. (supra) also, any action, transaction, decision or order which is illegal and void ab initio to be treated as non est and validity of such an illegal non est order could be questioned in any proceedings at any stage by anybody and such order does not create any right, title or interest. If the facts of the present case are considered, admittedly, there was no any instrument or registered document in respect of the transaction in question which was oral took place in the year 1958-59. Based upon such oral transaction of alleged mortgage, possession was handed over to the petitioner by respondent No.3 to 5 and necessary entries were made in the revenue record from 1964-65 and, therefore, considering the fact that the transaction was an oral transaction, there was no question of having prior permission in absence of any registered instrument of alleged mortgage.

While considering the said decision in case of Saburbhai Hemabhai Chauhan (supra), it would be appropriate to consider first the decision of the Full Bench of this Court in case of Jadav prabhatbhai Jethabhai v. Parmar Karsanbhai Dhulabhai reported in 2001(1) wherein the Full bench of this Court has held that the suit for declaration that the order is nullity has to be filed within the period of limitation. In para 22, 23 and 24 of the decision, it has been observed by

the Full Bench of this Court as under:

"22. We are of the clear opinion that when the binding decision or authority of the High Court stands even impliedly overruled, either by a decision of Larger Bench or Hon'ble apex Court no reference is necessary to a larger Bench as it is done, in the present case. The proposition of law has been extensively explored and very well expounded and settled in the field of Precedential Jurisprudence. but for the aforesaid special reasons and special circumstances coupled with the fact that the author of the reference has retired long before, we would have not thought it necessary or expedient to deal with and decide to whole appeal on merits making a departure from the usual and regular practice.

23. It becomes, therefore, very clear that the decision of the supreme court in Gurdev Singh (supra) in which Syed Qamarali's case has been considered and distinguished, is, squarely, attracted to the facts of the present case and the merits of the appeal could be decided on that basis itself. In para 10 of the decision in Gurdev Singh (supra) Qamarali's case (supra) has been specifically referred to and distinguished by giving facts and law elaborately. It has also been clearly observed that the right to sue accrued to Syed Qamarali was brought within the period of limitation. Qamarali's case stands on the different footing and is not relevant.

24. In the present appeal, the issue of limitation is decided against the appellants. It has been clearly found by the trial court that the suit was not brought within the period of limitation. It has been clearly pronounced in para 8 in Gurdev Singh's case that in view of the legal principles, the party aggrieved by the invalidity of the order has to approach the Court for relief of declaration that the order against him is inoperative and not binding upon him. He must approach the Court within the period of limitation. If the statutory time limit expired, the Court cannot give a declaration sought for.

25. The observations in para 6 and 7 are also very relevant and material.

'6. But nonetheless the impugned

dismissal order has at least a de facto operation unless and until it is declared to be void or nullity by a competent body or court. In Smith v. East Elloe Rural District Council, 1956 AC 736-769, Lord Radcliffe observed:

'an order even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.'

7. Appropos to this principle, Prof. Wade states : "the principle must be equally true even where the brand of invalidity is plainly visible, for their also the order can effectively be resisted in law only by obtaining the decision of the Court" (See Administration Law, 6th Ed. 350 Prof. Wade sums up these principles;

'the truth of the matter is that the Court will invalidate an order only if the right ready is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the Court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case, the 'void' order remain effective and is in reality, valid. It follows that an oroder may be void for one purpose and valid for another, and that it may be void against one person but valid against an other."

The main observations made by the Full Bench in the aforesaid decision are to the effect that the party aggrieved by the invalidity of the order has to approach the Court within the prescribed period of limitation for the relief of declaration that the order against him is

inoperative and not binding upon him. The main observations made by the Full Bench are to the effect that such an aggrieved party has to approach the Court within the prescribed period of limitation and if the period of limitation has already expired, then, the Court cannot give the declaration sought for. That would mean that when limitation has been prescribed, such a party has to approach within that prescribed period of limitation and when the limitation has not been prescribed in law in a particular case, then, it has to approach the Court or has to initiate the action within reasonable period. Therefore, in the facts and circumstances of the case, the period of 25 years in initiating the action cannot be considered to be reasonable period. As per the Full Bench decision of this court in aforesaid decision, the question of limitation and/or reasonable period would certainly come in the way of the respondents for taking action.

The apex court has, in case of State of Kerala versus M.K.Kunhikannan Nambiar Manjeri Manikoth, naduvil reported in 1996 AIR SCW 301, considered one more aspect that the void orders would be effective inter parties till set aside by the higher forum. In para 6 and 7 of the said decision, it has been observed by the apex court as under:

"6. It is not necessary for us to go into the merits of the case. we are of the view that the order passed inter parties in CRP 3440 of 1977 dated 2.11.1977, has become final, and it concludes the matter. The observations made in the proceedings, at the instance of the lst respondent regarding the validity of the order of the Board, in CRP No. 3696 of 1977, will not in any way affect the legality and validity of the proceedings declining to implead respondents Nos. 3 and 4 or the order passed in revision therefrom - CRP 3440 of 1977. It is true that the proceedings dated 28.6.1977 was observed to be void in law in CRP 3696 of 1977, filed by the first respondent. In our opinion, even a void order of decision rendered between the parties cannot be said to be non existentent in all cases and in all situations. Ordinarily, such an ordoer will, in fact, be effective inter parties until it is successfully avoided or challenged in higher forum. Mere use of the word 'void' is not determinative of its legal impact. The word 'void' has a relative rather than an absolute meaning. It only conveys the idea that the order

is invalid or illegal. It can be avoided. There are degrees of invalidity, depending upon the gravity of the infirmity, as to whether it is, fundamental or otherwise and in this case, the only complaint about the initiation of the suo motu proceedings by board was, that, it was not initiated on intimation by the State Land Board about the non filing of the statement as required by section 84(7) of the Kerala Land Reforms Act. In our opinion, this is not a case where the infirmity is fundamental. It is unnecessary to consider the matter further.

7. In Halsbury's Laws of England, 4th Edition (Reissued) Vol.1(1) in para 26, page 31, it is stated thus; -

'If an act or decision, or an order or other instrument is invalid, it should, in principle, be null and void for all processes; and it has been said that there are no degrees of nullity. Even though such an act is wrong, and lacking in jurisdiction, however, it subsists and remains fully effective unless and until it is set aside by a court of competent jurisdiction, until its validity is challenged, its legality is preserved.'

In the Judicial Review of Administrative Action, De Smith, Woolf and Jowell 1995 Edition age pages 259-260 the law is stated thus;

'The erosion of the distinction between the jurisdictional errors and non jurisdictional errors has, as we have seen, correspondingly, eroded the distinction between void and voidable decisions. The Courts have become increasingly impatient with the distinction to the extent that the situation today can be summarized as follows;

(1) All official decisions are presumed to be valid until set aside or otherwise held to be invalid by a Court of competent jurisdiction.'

Similarly, Wade and Forsyth in Administrative

Law, 7th edition, 1994, have stated the law thus at pages 341-342;-

'... every unlawful administrative Act, however, invalid is merely voidable but this is no more than the truism that in most situations the only way to resist unlawful actions is by recourse to the law. In a well known essays, Lord Racliffe said;

' An order, even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. UNless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.

This must be equally true even where the brand of invalidity is plainly visible; for there also the order can effectively be resisted in law only by obtaining the decision of the Court. T he necessity of recourse to the Court has been pointed out repeatedly in the House of Lorods and Privy Council without distinction between patent and latent defects."

The above statement of law supports our view that the order of the Board dated 28.6.1977, declining to implead respondents nos. 3 and 4 "which stood confirmed in revision" concludes the matter against respondents nos. 3 and 4. "

Therefore, in the facts and circumstances of the case, it is ex facie clear that the action has not been taken by the respondent authorities within the reasonable period. Since limitation has not been prescribed in the statute for such action, it was incumbent upon the authorities to initiate action within the reasonable period whereas in the instant case, in respect of the oral transaction of alleged mortgage relating to the year 1958-59, the authorities have issued the notice in the year 1984 on 15.9.1984. While considering the case, both the authorities below have ignored this aspect of the matter. The authorities below ought to have considered

that if the action or proceedings are not initiated within the reasonable period even for null and void orders, then, in the mean time, the affected party might have materially altered their position and irreparable injury would be caused to them and it would be impossible to put the clock back. Therefore, according to my opinion, in the facts and circumstances of the case and also in view of the decisions cited by Trivedi, learned advocate for the petitioner and also in view of the principles laid down by the Full Bench of this Court, the orders impugned in this petition are required to be quashed and set aside. The decisions cited by Ms. Pandit, the learned AGP for the respondent authorities are not applicable in the facts and circumstances of the present case. No other contentions were raised by Ms. Pandit, learned AGP for the respondent authorities.

Therefore, in view of the aforesaid discussion, present petition is allowed. The order passed by the Assistant Collector, Dahod dated 21.11.1984 as well as the order passed by the Dy. Secretary (Appeals) dated 10th June, 1986 are quashed and set aside. Rule is made absolute accordingly with no order as to costs.

Dt.23.10.2001. (H.K. Rathod,J.)

Vyas